

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 15-4268 JB

ANGEL DELEON, JOE LAWRENCE
GALLEGOS, EDWARD TROUP, a.k.a.
“Huero Troup,” LEONARD LUJAN,
BILLY GARCIA, a.k.a. “Wild Bill,”
EUGENE MARTINEZ, a.k.a. “Little
Guero,” ALLEN PATTERSON,
CHRISTOPHER CHAVEZ, a.k.a. “Critter,”
JAVIER ALONSO, a.k.a. “Wineo,”
ARTURO ARNULFO GARCIA, a.k.a.
“Shotgun,” BENJAMIN CLARK, a.k.a.
“Cyclone,” RUBEN HERNANDEZ;
JERRY ARMENTA, a.k.a. “Creeper,”
JERRY MONTOYA, a.k.a. “Boxer,”
MARIO RODRIGUEZ, a.k.a. “Blue,”
TIMOTHY MARTINEZ, a.k.a. “Red,”
MAURICIO VARELA, a.k.a. “Archie,”
a.k.a. “Hog Nuts,” DANIEL Sanchez, a.k.a.
“Dan Dan,” GERALD ARCHULETA, a.k.a.
“Styx,” a.k.a. “Grandma,” CONRAD
VILLEGAS, a.k.a. “Chitmon,” ANTHONY
RAY BACA, a.k.a. “Pup,” ROBERT
MARTINEZ, a.k.a. “Baby Rob,” ROY
PAUL MARTINEZ, a.k.a. “Shadow,”
CHRISTOPHER GARCIA, CARLOS
HERRERA, a.k.a. “Lazy,” RUDY PEREZ,
a.k.a. “Ru Dog,” ANDREW GALLEGOS,
a.k.a. “Smiley,” SANTOS GONZALEZ,
PAUL RIVERA, SHAUNA GUTIERREZ,
and BRANDY RODRIGUEZ,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Motion to Exclude Testimony of Yvonne Madrid Pursuant to Federal Rule of Evidence 501 and the Marital Communications

Privilege, filed April 30, 2018 (Doc. 2188)(“Motion”). In the Motion, Defendant Christopher Chavez argues that Yvonne Madrid, Chavez’ “former spouse and current common-law spouse,” is “prohibited from disclosing, by testimony or otherwise, any private marital communications between” Chavez and her during their marriage. Motion at 1-2.¹ It follows, according to Chavez, that “any proffered testimony by Yvonne Madrid should first be subjected to inquiry and examination to determine when and during what time frame such communications were had with Defendant Christopher Chavez” to determine whether those communications occurred during their marriage. Motion at 3.

Federal law recognizes two marital privileges:

The adverse testimonial privilege prohibits testimony by one spouse against another in criminal cases; it is designed to protect marital harmony at the time the testimony is demanded and to protect a witness from the difficult choice of incriminating a spouse or going to jail for contempt. The confidential communications privilege prohibits disclosure, in civil and criminal cases, of confidential communications from one spouse to another; it is designed to protect and further marital intimacy as of the time the communication is made between the spouses.

¹When evaluating marital privilege assertions, “[t]he status of marriage has been left to the states.” United States v. White, 545 F.2d 1129, 1130 (8th Cir. 1976)(per curiam). Consequently, one cannot enter into a common-law marriage -- for the purposes of a federal evidentiary privilege under rule 501 of the Federal Rules of Evidence -- in a state that does not recognize common-law marriage. See United States v. White, 545 F.2d at 1130. New Mexico does not recognize common-law marriages. See Merrill v. Davis, 1983-NMSC-070, ¶ 8, 673 P.2d 1285, 1286 (“[W]e note that common-law marriage is not acknowledged in New Mexico.”). See also N.M. Stat. Ann. § 40-1-2(A)(declaring that “[t]he civil contract of marriage is entered into when solemnized,” i.e., when two people are “join[ed] in marriage before witnesses by means of a ceremony”). There is no indication in the Motion or in the record that Chavez and Madrid lived together outside of New Mexico, so Chavez’ assertion in the Motion regarding common-law marriage does not impact the Court’s marital privilege analysis. See N.M. Stat. Ann. § 40-1-4 (recognizing the validity, in New Mexico, of “[a]ll marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted”).

Stephen A. Saltzburg et al., Federal Rules of Evidence Manual § 501.02[8] (11th ed. 2017). The adverse testimonial privilege does not prevent one spouse from voluntarily testifying against the other, however. See Trammel v. United States, 445 U.S. 40, 53 (1980). The adverse testimonial privilege ends when the marriage ends. See United States v. Bahe, 128 F.3d 1440, 1442 (10th Cir. 1997)(stating that the adverse testimonial privilege “permits one spouse to decline to testify against the other during the marriage”). See also Saltzburg et al., supra § 501.02[8] (“The adverse testimonial privilege does not apply if the witness and litigant are divorced or permanently separated at the time of the testimony.”).

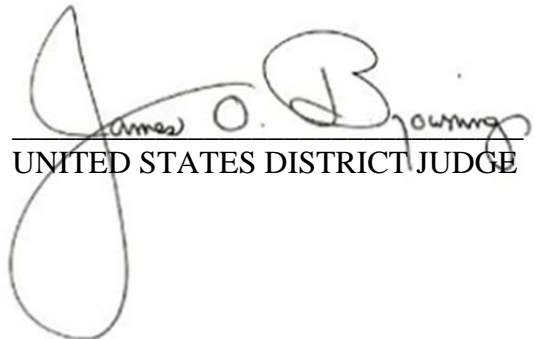
In contrast, the confidential communications privilege persists after a marriage ends, and either spouse can invoke the confidential communications privilege. See United States v. Bahe, 128 F.3d at 1442 (stating that “either spouse may assert” the confidential communications privilege “to prevent the other from testifying to confidential communications made during the marriage”). That privilege does not apply “whenever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential.” Wolfe v. United States, 291 U.S. 7, 14 (1934). While “marital communications are presumptively confidential,” Blau v. United States, 340 U.S. 332, 333 (1951), if “made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence,” Wolfe v. United States, 291 U.S. at 14.

Chavez and Madrid are no longer married, see Motion at 1 (stating that Madrid is Chavez’ “former spouse”), so the adverse testimonial privilege does not apply, see Motion at 2 (“[C]learly Yvonne Madrid cannot be compelled to testify against Defendant Christopher Chavez, if they were still in fact formally married.”). If, however, Chavez made statements to Madrid while they were married and those communications were confidential, the confidential

communications privilege would probably protect those communications. See United States v. Bahe, 128 F.3d at 1446 (acknowledging that a “marital communications privilege for spousal testimony” exists, but establishing an exception for communications “relating to the abuse of a minor child within the household”). Communications that Chavez made to Madrid that were not confidential -- such as prison telephone calls² or conversations where third parties were present -- are not privileged. Likewise, communications that Chavez or Madrid made before their marriage began or after it ended are not privileged.

Chavez does not direct the Court to any particular communications, so the Court cannot now make any particularized privilege determinations. The Court accordingly denies the Motion to the extent that it seeks to exclude Madrid’s testimony. The Court grants, however, the Motion to the extent that it asks the Court, once Madrid takes the stand, to make determinations regarding whether the marital communications privilege applies to her testimony.

IT IS ORDERED that the Motion to Exclude Testimony of Yvonne Madrid Pursuant to Federal Rule of Evidence 501 and the Marital Communications Privilege, filed April 30, 2018 (Doc. 2188), is granted in part and denied in part.



UNITED STATES DISTRICT JUDGE

²The Court has heard evidence that telephone calls made from New Mexico Corrections Department phones are preceded with an automated admonishment informing the call’s participants that their conversation may be monitored. Accordingly, such calls are not confidential. See Wolfe v. United States, 291 U.S. at 14.

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